Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (S/S) No. 918 of 2006

Kundan Singh ... Petitioner

Vs

State of Uttarakhand & others ... Respondents

Mr. C.S. Rawat, Advocate, present for the petitioner
Mr. B.P.S. Mer, Brief Holder, present for the State of Uttarakhand
Mr. Subhash Upadhyay, Advocate, present for respondent Nos. 4 to 9.

Hon'ble Kalyan Jyoti Sengupta, J. (Oral)

This writ petition has been filed by the petitioner initially contending that he should be given promotion by the respondents to the post of Lower Division Clerk/Data Entry Operator in the pay scale of 4500-125-7000 and give all consequential benefits of Lower Division Clerk/Data Entry Operator w.e.f. the date of his joining in the State of Uttarakhand.

It appears that there has been an amendment during the pendency of the writ petition. By an amendment respondent Nos. 4 to 9 were impleaded as parties. It appears in the amended writ petition that the aforesaid respondents had been given appointment to illegally fill up the post claimed by the petitioner.

The short fact of the writ petition is as follows:

The petitioner was appointed on 24.01.1991 as Peon. He was posted in the Vidhan Parishad Secretariat Uttar Pradesh on 01.09.1994. On bifurcation of the State of Uttar Pradesh and creation of the State of Uttaranchal (now Uttarakhand), he came over to the State of Uttarakhand, as he exercised option to switchover to this State. It is said that one of the conditions was that the incumbent, who would be going to Uttarakhand would get one higher pay scale post. Finally he was relieved of

30.12.2000 to enable him to join his services in this State. It is stated that on 18.01.2001, six posts of Lower Division Clerk/Data Entry Operator were created and he was under impression that he would be promoted to one of such post as he is qualified and deserving candidate. Unfortunately, he was not promoted, despite creation of the said posts. However he has admitted that he was promoted to the post of Typist on 18.08.2004. He made several representations to the respondents for granting promotion from the year 2001 on such created posts. His contention is that he ought to have been promoted automatically, as 15 per cent quota of the aforesaid total vacancies should have been filled up by promotion. In sum and substance he ought to have been promoted in the year 2001 when new six posts were created. Thereafter he filed this writ petition in the year 2006. During the pendency of the writ petition for six years, he was given another promotion. This fact is not in the writ petition and it has been brought in the amended writ petition.

In the counter affidavit it is stated that respondent Nos. 4 to 9 are not similarly placed with that of the writ petitioner. They were direct recruitee and the posts held by them are different what has been claimed by the petitioner. It is also stated in the counter affidavit of the respondents concerned that the petitioner accepted the promotion in the year 2004 without any protest. The petitioner however has said in the rejoinder affidavit that promotion in the year 2004 was accepted with protest. These are the factual aspect of the matter.

Learned counsel for the petitioner contends that if the relevant rules is read carefully it would evident that at least one post should have been kept for promotional avenue and in that case, the petitioner would have got promotion automatically. He submits that petitioner made repeated representations, as such, there is no delay and subsequent promotion orders do not affect his claim of promotion in past. According to him, the duty was cast upon the respondents to offer such promotion. He further submits that in this case six posts were created, if 15 per cent quota is worked out from above six posts it will appear taking into consideration of the fractional position, it should be at least one post was for promotional quota. In support of his contention he has relied on two decisions of Hon'ble Supreme Court in case of ***Union of India & another Vs R. Swaminathan & others*** reported in ***(1997) 7 SCC 690*** and in ***State of Haryana & others Vs Vijay Singh & others*** (unreported) in ***Civil Appeal No. 5947 of 2012.***

Learned counsel for the State of Uttarakhand / respondent Nos. 1 to 3 submits that the petitioner estopped from claiming any promotional right in relation of year 2001, as he did not take any action approaching this Court. He has come to this Court in the year 2006 to establish his claim, which is alleged to have accrued in the year 2001. He further submits that admittedly the promotion has been granted to the petitioner and this was accepted without any reservation or without foregoing his alleged right of promotion in the year 2001. Moreover, he contends pointing out to the relevant rules that right of promotion is not automatic and it is qualified with some conditions. Moreover, there were six posts and 15 per

cent of the six posts going by simple arithmetic calculation can not by any stretch of imagination be one post. Therefore, the writ petition is dismissed.

Mr. Subhash Upadhyay, appearing for respondent Nos. 4 to 9 submits that these private respondents have been unnecessarily brought in this proceedings, as their appointment in a different posts and that too by a direct recruitment. The posts hold by these respondents is not being claimed by the petitioner.

I have heard the respective contention of the learned counsel for the parties and I have also gone through the statements and averments made in the respective pleadings. While looking at the prayer of the petitioner, I think, the relief as prayed for cannot be considered nor can be granted at this stage reading statements and averments made in the writ petition as well as in the counter affidavit filed by the respondents. In the prayer it is mentioned that the respondents be directed to promote the petitioner to the post of Lower Division Clerk/Data Entry Operator in the pay scale of 4500-125-7000 and give all consequential benefits of the Lower Division Clerk/Date Entry Operator w.e.f. the date of his joining in the State of Uttarakhand.

In paragraph 20 of the writ petition it has been stated that the State respondents promoted the petitioner to the post of Typist vide order dated 18.08.2004. It appears from the supplementary counter affidavit that on 11.10.2007, the petitioner was given further promotion to the post of Assistant Review Officer in the pay scale of 4500-125-7000 on adhoc basis.

This fact has not been denied and disputed in the rejoinder affidavit. It is also said in the counter affidavit that the aforesaid promotion has been accepted without any protest or without prejudice to right and contention in the pending writ petition.

In the rejoinder affidavit, of course, it is stated that this was taken with protest. However, there is no contemporaneous document to record the protest having been made before accepting the promotion in the year 2004 in the post of Typist and then again in the post of Assistant Review Officer in the year 2007. Now the petitioner is holding separate post altogether and this post is neither the feeder post of the Lower Division Clerk/Data Entry Operator nor it is inferior to the post of Lower Division Clerk/Data Entry Operator.

In my view it is absurd to suggest that the order of promotion can be accepted with protest in this case. Had it been the order of promotion to the post of Lower Division Clerk/Data Entry Operator either in the year 2004 or in the year 2007 then this could have been some logic to presume that there should be protest as he was claimed for promotion from anterior date.

In my view when promotion order is accepted to the different posts, now the claim for promotion from anterior date to the post of Lower Division Clerk/Data Entry Operator is not tenable. I fail to understand why the respondent Nos. 4 to 9 have been made parties in this case. It appears from the counter affidavit filed by the above respondents that on 20.08.1998 respondent No. 5

was appointed as Lower Division Assistant in the pay scale of 4500-7000 by the erstwhile State of Uttar Pradesh and this appointment was made on the vacant post. Similarly respondent No. 4 – Narender Singh Rawat was appointed on 05.09.1998 as Lower Division Clerk in the pay scale of 4500-125-7000 on the vacant post. Thus respondent Nos. 4 and 5 were holding the post of superior to the petitioner when he was holding the post of Peon. Thereafter, by order dated 04.03.2002 respondents were appointed as Upper Division Assistant in the pay scale of 5500-9000 against the vacant post on adhoc basis. Then on 20.09.2007, respondent Nos. 4 to 9 were further promoted on adhoc basis on the posts of Section Officer. Therefore, it is clear that these respondents are not holding the posts in respect of which the claim has been made by the writ petitioner in the writ petition.

It is further submitted that when there was creation of post in the year 2001, he should have been promoted in the Lower Division Clerks, I hold that claim has now been abandoned; therefore, I do not find any merit in this writ petition at present.

The decisions cited by the learned lawyer for the petitioner are not applicable at all for the following reasons:-

The judgment rendered in the case of ***Union of India & another Vs R. Swaminathan & others*** reported in ***(1997) 7 SCC 69*** has not laid down any principle of law to be followed. The judgment in my view was rendered taking into consideration of particular case and has not decided any principle of law. In another

decision of the Hon'ble Supreme Court in case of ***State of Haryana & others Vs Vijay Singh & others*** (unreported) ***in Civil Appeal No. 5947 of 2012*** has laid down on legal principle which amongst other is as follows:-

> "When appointments are made from more than one source, it is permissible to fix the ratio of recruitment from different sources, and if rules are framed in this regard they must ordinarily be followed strictly."

Here as I have already decided that the petitioner has already abandoned his claim after accepting the orders of promotion to the different posts altogether which has got no co-relation to the post of promotion to which he has asked for in this writ petition. Therefore, this decision is also not applicable in this matter.

Accordingly, the writ petition is dismissed.

There will be no order as to costs.

(K.J. Sengupta, J.)

28.12.2012
ASWAL